UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES H. BELCHER, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBER DA-0432-98-0091-I-1 DATE: MAY 18 1999

James H. Belcher, San Antonio, Texas, pro se.

Captain Lara L. Kessler, Brooks Air Force Base, Texas, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review of an initial decision that affirmed the agency's action removing him for unacceptable performance. For the reasons set forth below, we GRANT the petition for review, AFFIRM the initial decision in part, VACATE it in part, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant from his GS-6 Medical Technician (Chemistry) position effective October 18, 1997, for failure to meet the standard of performance in one critical element. Initial Appeal File (IAF), Tab 5, Subtab

4a. The appellant filed this appeal to the Board, asserting that the agency's action was based on age, race and/or color discrimination, reprisal for engaging in equal employment opportunity (EEO) activity, and reprisal for whistleblowing. IAF, Tab 1. The appellant did not request a hearing. The administrative judge issued an initial decision affirming the agency's action and finding that the appellant did not establish his affirmative defenses. IAF, Tab 20.

¶3 On review, the appellant asserts that the administrative judge erred in failing to compel discovery and in accepting the agency's evidence after the close of the record. The appellant also asserts that the administrative judge erred in finding that the agency carried its burden of proof on the merits of the removal action and in finding that he did not establish his affirmative defenses. Petition For Review (PFR) File, Tab 1. Along with his petition for review, the appellant has submitted numerous documents for the first time with no showing either that they were previously unavailable below despite his due diligence or that they are relevant to this appeal. The appellant alleges that the agency did not timely comply with his discovery request and the motion to compel responses, which the administrative judge granted. However, the documents newly submitted on petition for review are not in response to any discovery request that is a part of the record. Thus, the appellant has not shown that they were unavailable below, and the Board has not considered them. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). As for the documents regarding his performance prior to the period for which he was rated unacceptable, we have not considered them because they are not relevant to the issues before us. *See Wilson v. Department of the Navy*, 24 M.S.P.R. 583, 586-87 (1984). The agency has timely responded in opposition to the petition for review. PFR File, Tab 3. The appellant has filed a reply to the agency's response before the close of the record on review. PFR File, Tab 5.

ANALYSIS

¶4 To establish the elements of a performance-based removal action under 5 U.S.C. ch. 43, an agency must show by substantial evidence that: (1) The Office of Personnel Management has approved its performance appraisal system; (2) the appellant's performance standards were communicated to him; (3) the appellant failed to meet one or more critical element of his position; and (4) he was given a reasonable opportunity to improve his performance. *See Greer v. Department of the Army*, 79 M.S.P.R. 477, 482 (1998). The agency presented unrebutted evidence to show that the appellant's performance standards were communicated to him and he was given a reasonable opportunity to improve. IAF, Tab 5, Subtabs 4fff, 4t, 4u, 4z, 4aa, 4gg, 4kk. As the administrative judge stated, the appellant did not challenge three of the four elements of a chapter 43 removal action, but only argued that he met the standard for performance in critical element 1E. Initial Decision at 3-4.

¶5 The agency charged that the appellant failed to meet the standard of performance in critical element 1E, "Performs sample analyses in AOTA (Extraction), AOTA (Instrumental), and AOTA (Immunoassay) on human urine aliquots." The standard was as follows: "Analyses are always performed in a timely manner and in accordance with Federal Regulations, Department of Defense directives, and Air Force policies. Analyses are always performed under proper Chain-of-Custody guidelines. Successfully completes and maintains requirements for certification. Errors are minimal and minor in nature. Major errors are unacceptable and may result in decertification." IAF, Tab 5, Subtabs 4f, 4fff.

¶6 According to the agency, the appellant failed to meet this standard when he was decertified in Extraction in February 1997 because of "poor extraction of Amphetamines and PCP, disregarding special instructions in extracting Amphetamines, failure to add internal standard ... to the negative BQC (Amps),

failure to add internal standard to a standard (OPI), and a tube swap (OPI)." IAF, Tab 5, Subtab 4f. He then failed his recertification plan because of poor extraction of the Amphetamine Analogs in batch # B97T0160. He failed a second recertification plan in March 1997 because of "failure to add the Methamphetamine internal standard to a batch (#B97T0258), and failure to correctly identify I and L samples in an Amphetamine Analog batch (#B97T0261)." *Id*. PCP batch #B97T0257 also failed because "the concentration of one of the 2X standard samples was unacceptable." *Id*. The appellant was placed on a performance improvement plan (PIP) on April 2, 1997, and given a third recertification plan, which he failed for similar reasons and for failure to meet a coefficient of variance standard. The appellant also failed a fourth recertification plan. *Id*.

¶7 The appellant argued that others were responsible for any mistakes made. IAF, Tabs 1, 7, 12. The agency submitted numerous documents related to the tasks that the appellant allegedly performed unsatisfactorily. IAF, Tab 5, Subtabs 4i, 4l-4eee. These documents constitute substantial evidence to show that errors were made and that the appellant was responsible for them. To refute this documentation, the appellant presented only his uncorroborated theories that the errors occurred after the urine samples left his custody or that the errors were the result of common failures of the testing materials. Additionally, he argued that it was implausible that his performance could decline so much in a short period of time. IAF, Tabs 1, 14. We agree with the administrative judge that the agency proved by substantial evidence that the appellant failed to meet the performance standard for critical element 1E and that the appellant's arguments are insufficient to rebut that evidence.

¶8 The appellant also argues that the administrative judge accepted evidence of OPM's approval of the agency's performance appraisal plan after the close of the record but refused to accept his late-filed evidence. PFR File, Tab 1 at 2-3. The

agency submitted a 1980 letter from OPM stating that its plan was acceptable but advising the agency to make the plan comply with its merit pay plan. IAF, Tab 5, Subtab 4fff. After the close of the record on February 13, 1998, the agency submitted additional letters dated 1986 and 1987 from OPM approving their performance appraisal plan. IAF, Tabs 11, 16. In the initial decision, the administrative judge stated that she was not considering the late-filed evidence of either party. Initial Decision at 2 n.*. In finding that the agency established the necessary elements of a chapter 43 case, the administrative judge referred to the 1980 OPM letter as evidence of its approval and noted that the appellant did not refute that evidence. Initial Decision at 3. Moreover, as a GS-6, the appellant was not covered by the merit pay plan. Thus, as it applied to the appellant, the 1980 performance appraisal plan was fully approved. We see no error in the administrative judge's determination regarding OPM's approval of the agency's performance appraisal plan. *See Satlin v. Department of Veterans Affairs*, 60 M.S.P.R. 218, 222 (1993). Thus, we agree with the administrative judge that the agency proved the elements of its chapter 43 case by substantial evidence.

¶9 In her analysis of the appellant's affirmative defense of discrimination based on age, race, and/or color, the administrative judge stated that the appellant submitted no evidence in support of his allegations. Initial Decision at 7-8. In his initial appeal and subsequent submissions, the appellant alleged generally that the agency's actions were based on discrimination because of age, race, and/or color and reprisal for engaging in EEO activity and whistleblowing. IAF, Tabs 1, 7. He alleged that he is black and that white and Hispanic lab technicians, who are younger than he, made errors similar to those with which he was charged and were not decertified or placed on a PIP or removed. In his discovery request, the appellant asked for documentation regarding errors made by other employees in the lab. IAF, Tab 8. The administrative judge granted his motion to compel, with the exception of item 1.7, and ordered the agency to comply, so that the appellant

would receive the documents on or before January 30, 1998. IAF, Tabs 9, 11. In a letter dated February 5, 1998, the appellant asserted that the agency did not comply with the administrative judge's order and filed another motion to compel. IAF, Tab 12. The agency responded that it had complied by sending a 450-page package of documents to the appellant by Federal Express on January 30, but the package could not be delivered because no one was at home. Subsequent attempts to deliver the package were also unsuccessful, as were attempts to telephone the appellant. IAF, Tab 13. The appellant disputed the agency's statement that it attempted to deliver the package and stated that he received part of the response to his discovery request on February 20. IAF, Tab 15. In documents filed after the record closed on February 13, the appellant identified the race and age of comparison employees for the first time. He also described in detail many instances of errors made by other employees. IAF, Tabs 14, 15, 17, 19. The administrative judge never responded to the appellant's second motion to compel or addressed the timeliness and adequacy of the agency's response to her earlier order. We find that the administrative judge erred in failing to respond to the appellant's second motion to compel. Because we cannot determine from the record whether the agency fully complied within the time limits with the order to respond to the appellant's discovery request, this appeal must be remanded.

¶10 In his discovery request, the appellant asked for a discrepancy report, suspension, decertification, and recertification forms, and chain-of-custody documents for certain laboratory procedures, identifying them by batch number. IAF, Tab 8. The appellant submitted some evidence in support of his claim of discrimination based on age, race, and/or color after the record closed below, but the administrative judge did not consider it. IAF, Tab 15. If, on remand, the administrative judge determines that the agency did not comply with her order to produce documents requested in discovery or untimely complied, the administrative judge shall consider the evidence in the record. Furthermore, the

appellant may submit any additional evidence, if he was prevented from filing it earlier by any lack of compliance on the agency's part. Also, the appellant describes certain instances of laboratory errors with a great deal of detail in his petition for review, as he did below. PFR File, Tab 1 at 15-19; IAF, Tab 19. He acknowledges that documentation of some of the alleged errors does not exist because the agency did not complete its usual discrepancy report or otherwise document the error. The appellant could not have known that there was no discrepancy report until he received the agency's response. If the administrative judge determines that the agency was not in compliance with her order compelling discovery, she shall afford the appellant an opportunity to supplement the record. We emphasize to the appellant that his unsworn and uncorroborated statements on petition for review and below may be insufficient to establish the facts of these alleged incidents. In the absence of documentary evidence, the appellant should present his affidavit and the affidavits of other witnesses to the incidents. The administrative judge shall afford the agency an opportunity to submit evidence to refute any evidence presented by the appellant.

¶11 The administrative judge found that the appellant did not establish his affirmative defense of reprisal for engaging in EEO activity because he failed to submit any evidence in support of that defense. Initial Decision at 8-9. We note that his discovery request included no requests for documents specifically related to his EEO complaints. On petition for review, the appellant asserts that he believed that "the agency representative would verify [his] race, color, age, and EEO/IG activity." PFR File, Tab 1 at 3. The appellant was clearly informed that he bore the burden of proof to establish his affirmative defenses. IAF, Tab 11. We see no reason to disturb the administrative judge's finding in regard to the appellant's reprisal for engaging in EEO activity defense.

¶12 For the same reasons, we affirm the administrative judge's finding in regard to the appellant's claim that his removal was in retaliation for whistleblowing.

Initial Decision at 9-10. We agree with the administrative judge that the appellant submitted no evidence below to show that he reasonably believed that his complaints to the Inspector General contained disclosures of violations of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)(A); Initial Decision at 9-10. Thus, the appellant did not establish that he engaged in whistleblowing. As the appellant has not shown that his failure to submit such evidence resulted from the agency's alleged failure to comply with the order to compel, we see no reason to disturb the administrative judge's decision in this regard.

ORDER

¶13 Accordingly, we REMAND this appeal to the Dallas Field Office for further adjudication regarding the appellant's affirmative defense of discrimination based on age, race, and/or color consistent with this opinion. The administrative judge shall determine whether the agency timely complied with her order compelling responses to the appellant's discovery request. If she finds that the agency did not do so, she shall consider the appellant's evidence already in the record and afford him an opportunity to submit additional evidence that he was prevented from submitting below because of the agency's noncompliance. Further, she shall afford the agency an opportunity to present evidence and argument in response to any newly considered or newly submitted evidence.

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.